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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-550, 73-867, 73-868,
73-871, 73-872, 73-874

TEXASGULF INC., *et al.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

REPLY OF EXXON CORPORATION AND TEXACO INC. TO BRIEF OF THE FEDERAL POWER COMMISSION IN OPPOSITION

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RESPONSE

In its brief in opposition to petitions for writs of certiorari, the Federal Power Commission (Commission) presents, in capsule form, arguments which it might make in its brief on the merits after certiorari is granted. It wholly ignores the central issue raised by Exxon Corporation (Exxon) and Texaco Inc. (Texaco) that the lower court's interpretation of Section 1(c) of the Natural Gas Act (Act) would deny the operative purpose of Section 1(c), namely, to relegate matters of local concern to the states.[1]

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[1] Exxon and Texaco limit this reply, like their joint petition, to the Section 1(c) exemption issue. Our limitation should not be

The Commission's circumscribed argument focuses upon two specific criteria for exemption under Section 1(c) and claims that such criteria have not been met. Briefly, these are the "receipt from another person" and the "state regulation" arguments. The Commission is plainly wrong in each of its arguments. We will, of course, analyze the Commission's arguments in detail in our brief on the merits. However, at this juncture, we ask the Court to note carefully that the Commission has essentially ignored the major premise of the lower court's decision that Section 1(c) was intended only to exempt local distribution companies. (App. at 21a-22a) Certainly, such is not the case. Before the Hinshaw Amendment, most local distribution companies were already exempt under Section 1(b) of the Act. Accordingly, there was no need for additional legislation to exempt local distribution.

The *East Ohio* case,[2] which engendered Section 1(c), stood squarely for the proposition that statewide pipeline

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construed as agreement with the Commission's interpretation of facts or law on other issues. For example, the Commission's assertion that the "relevant channel of constant flow in this case is not that of the Green System East . . ." is obviously wrong when jurisdiction or exemption of the Green System-East is involved. From the vantage point of all gas consumed in the Green System-East the channel of constant flow from sources in Louisiana to the burner tip is wholly within the State, *i.e.*, intrastate. Moreover, the Commission's interpretation (Br. at 12) of California v. Lo-Vaca Gathering Co., 379 U.S. 366 (1965) and FPC v. Amerada Petroleum Co., 379 U.S. 687 (1965) is in error. Those cases do not stand for the proposition that any gas taken from a stream within the source state is jurisdictional if some other gas in that stream is transported and sold outside the state. Quite the contrary, Lo-Vaca and Amerada stand for the proposition that a sale by a supplier within the source state is not exempt merely because equivalent quantities are withdrawn from the stream within the state. Since it could not be shown that gas supplied by Lo-Vaca and Amerada would, in fact, be consumed within the source state, their sales were held to be jurisdictional. By contrast, all the gas on the Green System-East is consumed within the State of Louisiana.

[2] FPC v. East Ohio Gas Co., 338 U.S. 464 (1950).

operations, entirely within a consuming state, which involved gas received from out of state are subject to Commission regulation, despite their local nature. The touchstone of exemption under Section 1(c), as the legislative history[3] and statutory language[4] makes clear, is the local nature of the activity involved. The Commission's brief does not address this issue.

In failing to come to grips with the determinative issue, the Commission also misinterprets or inaccurately analyzes several of the cases cited by Exxon and Texaco in their joint petition. For example, the Commission seeks to dismiss *Columbia Gas of West Virginia, Inc.*, 44 F.P.C. 1260 (1970) and *Michigan Consolidated Gas Co.*, 46 F.P.C. 658 (1971) on the ground that those cases involved receipt of gas from another corporate entity (Br. at 14, n. 9). But, those cases were cited (Pet. at 9) to illustrate, contrary to the lower court's theory, that the Section 1(c) exemption is not limited to distribution companies but applies to statewide pipeline companies.

Likewise, the Commission is incorrect in its analysis of *Mountain Gas Co.*, 42 F.P.C. 305 (1969) for that case did involve facts parallel to the Green System-East operations. In *Mountain*, Cabot Corporation moved gas from sources in West Virginia to its Bradley Compressor Station where the stream was split, part going to a separate interstate pipeline company for transportation out

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[3] See, *e.g.*, "Hearing Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 83rd Cong., 1st Sess., on H.R. 2679 and H.R. 3707 Bills to amend the Natural Gas Act of 1938, as amended, and H.R. 3769, H.R. 3892, H.R. 5298, and H.R. 5976, Bills to amend Section 1 of the Natural Gas Act" (June 29, 1953, pp. 5, 8, 18, and 25). *See also*, 100 CONG. REC., Vol. 48, pp. 3042-4043, (daily ed. March 15, 1954). Virginia Petroleum Jobbers Ass'n v. FPC, 265 F.2d 364, 368 (D.C. Cir. 1959).

[4] Section 1(c) of the Natural Gas Act declares in part "[t]he matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States."

of state and the remainder being delivered into Cabot's pipeline system for which Section 1(c) exemption was declared.

In *Utah Gas Service Co.*, 38 F.P.C. 1219 (1967), *reh. denied*, 39 F.P.C. 388 (1968), the significant point to be emphasized is that Mountain Fuel's Orem-Uintah line (exempt) "is an integral part of the jurisdictional facilities of the Mountain Fuel system which extends through Wyoming (where some sales for resale are made) into Utah. . . . Physically, this would indicate that there is a floating point on the system where the gas from the jurisdictional and nonjurisdictional systems mingle." (*Id.* at 1221-1222)

The Commission also overlooks the fact (Br. at 14, n. 9) that *Pennzoil Pipeline Co.*, 44 F.P.C. 291 (1970) involves operation of a pipeline system in Texas which forms an integral part of United Gas Pipe Line Company's interstate system where Louisiana gas, as well as Texas-produced gas, is received into the Texas system. For years, United chose to operate the system on a jurisdictional basis, but in 1970 elected to set up an affiliate and obtained an exemption. Today, as an exempt company, its operations are no more "local in nature" merely by reasons of the establishment of a corporate veil.

Finally, the Commission argues (Br. at 16) that the Green System-East does not qualify for exemption because the State of Louisiana cannot regulate direct industrial sales. Although the Commission, itself, is forbidden by Section 1(b) from regulating direct sales, it claims authority over transportation of gas to be used for direct sales and argues that such transportation is beyond the power of the State of Louisiana. But the Commission is simply wrong. The limitation in the Louisiana Constitution applies to direct sales just as the restriction of Commission jurisdiction under Section 1(b) of the Natural Gas Act applies to direct sales. The State is not pro-

hibited from regulating transportation. In fact, in December 1973, Louisiana enacted into law the Natural Resources and Energy Act of 1973 (La. Rev. Statutes, Title 30, Ch. 7, Extraordinary Session 1973, Senate Bill No. 9) which makes clear that the State can regulate transportation. Moreover, as we pointed out in our petition (Pet. at 11-12) exemption under Section 1(c) is entirely consistent with application of a uniform federal curtailment policy. Implementation of State regulation of the Green System-East through exemption under Section 1(c) will effectively coordinate State and Federal authority and carry forward the purpose of the Hinshaw Amendment.

CONCLUSION

WHEREFORE, for all the foregoing reasons, as well as for the reasons set forth in their joint petition, Exxon and Texaco request that the Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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